FILED
AUG 30 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-88

In the Supreme Court of the United States

BAYER CORPORATION AND WYETH,
Petitioners,

v.

JAMES E. ANDERSON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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REPLY TO STATEMENT OF THE CASE

Respondents raise three points that require reply: (1) The Ninth Circuit did not rule on misjoinder; (2) Petitioners did not raise improper joinder in the MDL Court; and (3) CMO 15 did not establish that the Anderson plaintiffs were misjoined. All three assertions are wrong.

First, the Ninth Circuit's refusal to sever the plaintiffs who named non-diverse defendants was a ruling on misjoinder. Petitioners argued, with citation of supporting case law,[1] that eight plaintiff-appellants who asserted claims against non-diverse defendants could not destroy diversity for the other 46 plaintiffs-appellants, because they were misjoined, and pointed out that the MDL Court's holding of misjoinder was not disputed.[2] Accordingly, Petitioners argued, the Ninth Circuit should affirm the MDL Court's

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[1] Respondents incorrectly claim that Petitioners did not raise the improper joinder issue in the Ninth Circuit because they did not cite *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996) in the Brief of Appellees. Petitioners expressly raised the issue in that brief and cited three cases approving or applying the fraudulent misjoinder doctrine, including *In re Benjamin Moore & Co.*, 318 F.3d 626, 630-31 (5th Cir. 2002), which recognized "the force of the *Tapscott* principle." Brief of Appellees at 16, 22.

[2] Respondents incorrectly claim that Petitioners did not identify the Order that held the Anderson plaintiffs misjoined. Petitioners specifically asserted that CMO 15 held plaintiffs in multi-plaintiff cases – including pending and future cases – misjoined under F.R.C.P. 20 and required filing of severed individual complaints; that CMO 15 applied to the Anderson plaintiffs, who did not object to its application; and that the Anderson plaintiffs did not challenge the MDL Court's conclusion that they were misjoined. Brief of Appellees at 4, 8-9, 14, 22.

denial of remand as to the 46 indisputably misjoined plaintiffs who asserted claims only against diverse defendants, regardless of whether it held the other eight plaintiff-appellants fraudulently joined non-diverse defendants.

The court of appeals held that the non-diverse defendants were not fraudulently joined. In addition, the court rejected Petitioners' improper joinder argument by refusing to sever the eight plaintiffs who named non-diverse defendants. The effect was that diversity was destroyed for all plaintiffs' claims, and the court ordered the entire case remanded to state court. That the court of appeals did not elaborate on its reasoning or address cases cited by Petitioners does not mean it did not rule on the improper joinder issue.

Contrary to Respondents' assertion, Petitioners do not seek review of the Ninth Circuit's holding that the non-diverse defendants were not fraudulently joined, nor do they ask this Court to grant certiorari "to evaluate the product liability law of Mississippi," Brief in Opposition at 1, as Respondents contend. They seek review of the court of appeals' improper joinder holding.

Second, Petitioners raised improper joinder in the MDL Court, did not waive it, and the issue was squarely before the court on the motion to remand. As Respondents admit, Petitioners invoked the jurisdiction of the federal court by asserting diversity based on improper joinder, in addition to fraudulent joinder, in the Notice of Removal. The motion to remand raised the question whether the MDL Court had diversity jurisdiction as alleged in the Notice of Removal. Expressly responding to Petitioners' assertion of improper joinder in the Notice of Removal, Respondents in the motion to remand referred to *Tapscott* and moved, alternatively, for severance and remand of plaintiffs who named non-diverse

defendants. Given the Respondents' motion for severance, and given that the MDL Court previously had found non-diverse defendants fraudulently joined in ten similar actions, Petitioners did not request severance but sought denial of remand because the non-diverse defendants were fraudulently joined.

Third, CMO 15 applied to the Anderson plaintiffs and established that they were misjoined. In CMO 15, the MDL Court held that all plaintiffs in multi-plaintiff cases were misjoined under F.R.C.P. 20 and required each to file an individual severed complaint. The Order expressly applied to pending and future docketed cases. Thus, when the Anderson case was docketed, CMO 15's holding of improper joinder applied to it, and Anderson became subject to CMO 15's severance requirement. At no time after Anderson was docketed did the Anderson plaintiffs object to CMO 15 or its application to them. Rather, they filed individual severed complaints, pursuant to CMO 15, but did so tardily, resulting in their dismissal.

REPLY TO REASONS FOR DENYING THE PETITION

A. Reply to Argument that Ninth Circuit Did Not Address Misjoinder Issue.

Respondents raise the new point that the Ninth Circuit did not hold the Anderson plaintiffs improperly joined, and therefore it could not possibly have ruled on whether improper joinder can defeat diversity. Since the Ninth Circuit did not rule on the improper joinder issue, they argue, this Court should not grant certiorari to review it. This point is fundamentally flawed because it completely overlooks the court of appeals' severance ruling, which as explained above,

was a ruling on the improper joinder argument advanced by Petitioners.

Petitioners argued that plaintiffs who only claim against diverse defendants – and whose claims would be removable if filed separately – cannot defeat a defendant's right to remove by improperly joining other plaintiffs who claim against non-diverse defendants. The Ninth Circuit's refusal to sever the eight plaintiffs who named non-diverse defendants rejected this argument. While the court did not use the word "misjoinder," this does not mean it did not address the misjoinder issue.[3]

Respondents argue that the Ninth Circuit did not address Petitioners' improper joinder argument because Petitioners waived that argument by not raising it in the MDL Court. There is no hint of this in the Ninth Circuit's Opinion. To the contrary, the severance holding establishes that the Ninth Circuit did rule on Petitioners' improper joinder argument. Further, as explained above, Petitioners did not waive the issue, which was squarely before the MDL Court. *See Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 469 (2000) (issue is preserved if lower court is "fairly put on notice as to the substance of the issue"); *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) (argument may be considered on

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[3] Respondents are correct that, before a court can sever improperly joined plaintiffs, it must hold that they are improperly joined. The converse, however, is not true. A court can refuse to sever improperly joined plaintiffs, either by holding that the plaintiffs are improperly joined or by assuming without deciding that they are improperly joined, but holding that it will not sever. *See, e.g., Rabe v. Merck & Co., Inc.*, 2005 WL 2094741, at *2 (S.D. Ill. 2005) (rejecting fraudulent misjoinder doctrine without deciding whether plaintiffs were improperly joined).

appeal if it was "raised sufficiently for the trial court to rule on it" – whether the court ruled on it or not); *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205-06 n. 1 (9th Cir. 1991) (where party argued issue below and opposing party did not respond, opposing party was not precluded from arguing issue on appeal).

Respondents cannot write the severance holding out of the Ninth Circuit's Opinion. This Court should grant certiorari to consider this important question of federal jurisdictional law.

B. Reply to Argument that Ninth Circuit's Decision Does Not Conflict with Eleventh and Fifth Circuits' Decisions.

Respondents urge a narrow reading of the Eleventh Circuit's *Tapscott* decision and argue that the Ninth Circuit's decision is perfectly consistent with *Tapscott*. They claim that nothing in the Opinion suggests disagreement with *Tapscott*. Respondents again ignore the court's severance ruling in response to Petitioners' misjoinder argument. In rejecting severance, the remedy required by the improper joinder cases cited by Petitioners and by *Tapscott*, the Ninth Circuit rejected Petitioners' improper joinder argument and *Tapscott*.

The Ninth Circuit's decision directly conflicts with *Tapscott*. In *Tapscott*, the court held the misjoinder was so "egregious" it amounted to fraudulent joinder because there was "no real connection" between the automobile class non-diverse defendant and the merchant class controversy. 77 F.3d at 1360, *quoting Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). Similarly, in this action, there is no alleged connection between any non-diverse defendant and the controversies of 46 of the plaintiffs.

Respondents argue that this case is like *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284 (11th Cir. 1998), where the Eleventh Circuit distinguished *Tapscott*. *Triggs*, however, involved a single class seeking joint liability of defendants in a fraudulent leasing scheme, where the court held the non-diverse defendant properly joined and looked only to the citizenship of named parties to determine diversity. This case, involving improperly joined plaintiffs, only a few of whom assert a claim against a non-diverse defendant, who has no connection with the rest of the plaintiffs, presents facts more similar to those in *Tapscott* and *In re Benjamin Moore* and conflicts with those decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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